IN THE UPPER TRIBUNAL **Case No.** GIA/1148/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **T H Church, Judge of the Upper Tribunal**

Decision: The appeal is allowed. The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) which it made on 20 March 2019 under reference EA/2019/0051 involved the making of a material error of law. It is set aside.

The Appellant's application for an extension of time for making an appeal against the Information Commissioner's Decision Notice FS50760607, dated 23 July 2018, is remitted to be re-heard by a differently constituted First-tier Tribunal, subject to the Directions below.

This decision is made under Section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Background

1. The Appellant requested information from North Yorkshire Police relating to a covert police operation in 2015 (his **"FOIA Request"**). North Yorkshire Police neither confirmed nor denied holding information within the scope of the request, citing section 40(5)(a) (Personal data) of the Freedom of Information Act 2000 (**"FOIA"**). The Appellant then referred the matter to the Information Commissioner, who decided on 23 July 2018 that North Yorkshire Police was entitled to rely on section 40(5)(a) (Personal data) of FOIA to neither confirm nor deny if the requested information was held (the **"ICO's Decision"**).

2. The Appellant lodged a notice of appeal to the First-tier Tribunal (General Regulatory Chamber) (Information Rights) (the **"F-tT"**) against the ICO's Decision, which was received by the F-tT on 25 February 2019, some six months and 5 days after the 28 day time limit for lodging such a notice.

3. On 13 March 2019 Registrar Worth acknowledged that the Appellant had given reasons for the delay in lodging the appeal notice but decided that it was not appropriate to extend the time limit for appealing the ICO's Decision to the F-tT (the **"Registrar's Decision"**).

4. By an application dated 19 March 2019 the Appellant asked that a judge review the Registrar's Decision. On 20 March 2019 Judge McKenna (the Chamber President of the General Regulatory Chamber), sitting in chambers, reviewed the Registrar's Decision. She considered the matter afresh but concluded that the factors the Appellant relied upon to justify an extension of time were insufficiently weighty to justify re-opening the dispute after such a long time. She decided that it was fair and just to refuse to extend time and confirmed the Registrar's Decision (the **"CP's Decision"**).

5. The Appellant then applied to the F-tT for permission to appeal to the Upper Tribunal. His grounds raised several criticisms both of the Registrar's Decision and the CP's Decision.

6. On 12 April 2019 Judge McKenna, sitting in chambers, considered the Appellant's application for permission to appeal to the Upper Tribunal. She treated his application as an application for permission to appeal the CP's Decision rather than the Registrar's Decision.

7. She first considered whether to review the CP's Decision but decided not to because she was not satisfied that it involved any error of law. She then considered whether the Appellant's grounds of appeal were arguable with a realistic (as opposed to fanciful) prospect of success, but decided that they weren't as they amounted to nothing more than a disagreement with the conclusion that she had reached in undertaking the balancing exercise of factors to be taken into account in deciding whether to grant an extension of time. She therefore refused permission to appeal the CP's Decision.

8. The Appellant then applied to the Upper Tribunal for permission to appeal, which was when the matter came before me. An oral hearing of the application took place on 16th September 2019 at The Rolls Building in London. The Respondent chose not to attend, wasn't represented and made no written submissions in relation to the application (as was her right).

9. In advance of the hearing the Appellant produced written submissions, on which he expanded orally at the hearing. The Appellant represented himself and gave a very good account of his grounds of appeal. He was well-prepared, he focused on the issues relevant to the application and he took full account of what I had said in my directions about the narrow purpose of the hearing.

The issues before me at the permission hearing

Identifying the decision under appeal

10. First, I had to decide whether the application should be treated as being for permission to appeal the Registrar's Decision (as the Appellant thought) or of the CP's Decision (which the Chamber President thought). While I accepted the Appellant's point that the upshot of the CP's Decision was that the Registrar's Decision "must stand", and was therefore still operative, given that his appeal had already been the subject of a *de novo* reconsideration by the Chamber President, I decided that the Chamber President was right to treat the application as being in respect of the CP's Decision rather than the Registrar's Decision. Registrar Worth's reasons were therefore relevant only to the extent that they were adopted or approved by the CP's Decision.

Is it arguable with a realistic (as opposed to fanciful) prospect of success that the CP's Decision involved an error of law?

11. The key issue I then had to decide was whether the Chamber President was entitled to exercise her judicial discretion whether to grant an extension of time and to admit the appeal in the way that she did, or whether it is arguable with a realistic prospect of success that she erred in law in some way, either by misunderstanding or misapplying the law, by managing her procedure in a way which was unfair, or by failing to explain the reasons for her decision to the required standard of adequacy.

12. I was not required to decide whether there was merit to the Appellant's appeal against the ICO's decision.

My grant of permission to appeal

13. One of Mr Leighton's principle arguments was that the CP's Decision was erroneous because it was based on her finding that it was "unreasonable [for Mr Leighton] to fail to heed the clear advice given in writing" in the ICO's Decision that "any appeal should be made to the Tribunal within 28 days" (see paragraph 11 of the CP's decision at p. 16 of the appeal papers).

14. Mr Leighton argued that the text which set out the "clear advice" on which the Chamber President relied (at paragraph 39 of the ICO's Decision on p. 48 of the appeal papers) was not advice at all, but rather a generic boilerplate paragraph which didn't even form part of the ICO's Decision. I didn't accept that. The paragraph comes before the signature on the decision and is under the heading "Rights of appeal" and I was not persuaded that its position in the document makes it any less a part of the decision than the paragraph relied upon by Mr Leighton, which falls under the heading "Other matters".

15. The Appellant argued that, notwithstanding the statement relied upon by the Chamber President, he was entitled to rely on the specific advice which the Information Commissioner gave him in her decision namely that:

> "it is appropriate that any decision as to whether or not a data subject is entitled to be told if personal data about them is being processed should be made in accordance with the subject access provisions of the DPA." (see paragraph 32 of the ICO's Decision at p. 47 of the appeal papers)

16. Mr Leighton's case was that he followed the ICO's advice when he promptly made a subject access request in respect of the same information which had been the subject of his FOIA Request, and it was only once this application reached a dead end that he decided to pursue an appeal in respect of the ICO's Decision. He said that were it not for his diligent pursuit of the ICO's specific tailored advice to him in paragraph 32 of the ICO's Decision there would have been no delay in his making his appeal to the F-tT, and as such this amounts to a good reason for the lengthy delay.

17. In my grant of permission (which was addressed to the Appellant) I said:

> "21. Given the Chamber President's finding that it was unreasonable for you not to follow the Information Commissioner's "advice" in paragraph 39 of the ICO's Decision, it may have been incumbent on her to explain why it was not reasonable for you to follow the Information Commissioner's advice in paragraph 32 to pursue this matter under the DPA, rather than under FOIA.
>
> 22. The Chamber President has said that you haven't advanced "a good explanation for the delay" because of the clear statement about the appeal deadline in paragraph 39, but she hasn't engaged specifically with the argument you put about reliance on paragraph 32 and the possible tension between them. Rather, she states generally that "the factors relied upon for extending time are in my view insufficiently weighty to justify re-opening the dispute so considerably after the time for appealing has passed".

> 23. The Chamber President had a very wide ambit of discretion in deciding whether it was appropriate to grant you an extension of time. She correctly identified the proper approach to take to the judicial exercise of her discretion, citing the Upper Tribunal authorities of *Data Select Limited v HMRC* [2012] UKUT 187 (TCC), *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC), *BPP University College of Professional Studies v HMRC* [2014] UKUT 496 (TCC). She may well have had good reasons for finding that the reasons you gave for the delay were outweighed by the other considerations she was required to put in the balance. However, if she did have such good reasons she didn't explain what they were.
>
> 24. The reasons given in the CP's Decision are crisp and to the point. She directed herself correctly as to the proper legal tests and explained her reasons succinctly and with admirable clarity. However, I find that it is arguable that it was incumbent on her to address your argument about your reliance on the Information Commissioner's advice in paragraph 32 of the ICO's Decision expressly, and to explain how she evaluated it, and I find it arguable with a realistic prospect of success that the omission to do so renders her reasons inadequate."

18. I decided that it was arguable with a realistic prospect of success that the F-tT erred in law in the way I had identified and that it was appropriate to grant permission to appeal. The Appellant had raised other grounds but, for the reasons I gave in my permission decision, I was not persuaded that any of them was arguable with a realistic prospect of success and so restricted my grant of permission to the ground explained above. I invited the Respondent to make submissions, and gave the Appellant an opportunity to respond.

19. Neither party asked for an oral hearing and I didn't think that the interests of justice required one. I therefore decided to determine the appeal on the papers alone.

The Respondent's position on the appeal

20. Sapna Gangani, on behalf of the Respondent, agreed that the CP's Decision could have been more comprehensive, and would have been improved had it specifically addressed the Appellant's argument that the delay in his lodging his appeal was due to his heeding the advice of the Information Commissioner, but argued that the outcome would have been no different had the error not been made (i.e. the extension of time for filing the appeal would still have been refused).

21. The Appellant responded to say that the Information Commissioner's position that Judge McKenna would have come to the same conclusion amounts to "pure speculation" and is lacking in substance.

My decision on the appeal

22. In deciding whether to grant permission to appeal I had to be satisfied that it was arguable with a realistic prospect of success that the F-tT had erred in law in a way which was material. The test I must now apply is whether, on the balance of probabilities, the F-tT did indeed make a material error of law.

23. For the same reasons I was satisfied that it was arguable that the F-tT had erred I now find that it did so err. On the issue of whether the error was material, I cannot share the Information Commissioner's confidence that the outcome of Judge McKenna's decision on permission would have remained the same had she dealt with the argument he made about

his reliance on the Information Commissioner's advice. That is the problem with an inadequacy of reasons.

24. In *Flannery and Flannery v Halifax Estate Agencies* [2000] 1 WLR 377 the Court of Appeal found that the judge was under a duty to give adequate reasons but had failed to do so, saying:

> "Without such reasons, his judgment is not transparent, and we cannot know whether the judge had adequate or inadequate reasons for the conclusion he reached."

25. Given the nature of the error I can't be confident that the error wasn't material, because if reasons are inadequate the reader can't be sure of the basis of the decision, and whether that basis was sound. In this case we can't know whether Mr Leighton's argument that it was reasonable for him to follow the Information Commissioner's advice to pursue his request under the framework of the DPA rather than FOIA was weighed in the balance with the other factors or, if it was, whether appropriate weight was given to it.

26. I therefore set the CP's Decision aside. Neither party has suggested that I should re-make the decision. I remit the matter to be considered afresh by the First-tier Tribunal (General Regulatory Chamber) in accordance with the Directions below.

DIRECTIONS

The following Directions apply to the re-hearing:

1. The new First-tier Tribunal to which this matter is remitted should not involve the Registrar who made the decisions dated 13 March 2019 under F-tT file reference EA/2019/0051.

2. The new First-tier Tribunal to which this matter is remitted should also not involve Tribunal Judge who made the decisions dated 20 March 2019 under F-tT file reference EA/2019/0051.

3. These Directions may be supplemented by later directions issued by the First-tier Tribunal (General Regulatory Chamber).

Signed

Thomas Church
Judge of the Upper Tribunal

Dated **04 December 2019**